

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2000B157(C)

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOHN TAFOYA,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

This matter was heard on September 11-12, 18, November 21, 27-28, and December 11-12, 2000, before Administrative Law Judge (ALJ) Robert W. Thompson, Jr. Susan J. Trout, Assistant Attorney General, represented the respondent. Complainant appeared in person and was represented by Charles F. Kaiser, Attorney at Law.

The ALJ heard testimony from respondent's witnesses Rudy Dorsey, Correctional Officer I; Michael Siemsen, Maintenance Support Supervisor; Harold Craft, Physical Plant Manager; Suzanne Valdez Smith, Sergeant; Phillip DeFelice, Lieutenant; Grace Beard, DOC Criminal Investigator; Robert Harrison, Lieutenant; John Alborghetti, Correctional Officer I; Mary West, Deputy Director of Special Operations and Community Services; Donna Smith,

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Correctional Officer I; Sherrie Greco, Director of Training; Sheryl Wood, Case Manager I; and Alan Bennett, Warden, Colorado Correctional Center.

In addition to testifying on his own behalf, complainant called witnesses Dennis Burr, Shift Commander; Grace Beard, Criminal Investigator; William Lechuga, General Professional III; Daryl Proffitt, Area Volunteer Coordinator; Linda Cone, Sergeant; and Randall Caswell, Case Management & Program Supervisor.

Respondent's Exhibits 1, 8, 9, 10, 11, 12, 15-23, 25, 43, 45, 46, 62, 63 (diagram), 64 (diagram) and 65 were admitted into evidence without objection. Respondent also offered complainant's Exhibits GG, I, L, N and W, which were admitted. Exhibits 2, 3, 4, 6 and 47-61 were admitted over objection.

Complainant's Exhibits A, B, I, M, P and R were admitted without objection. Exhibits D and E were admitted over objection. Exhibits CC, DD, HH and II were excluded.

MATTER APPEALED

Complainant appeals his disciplinary demotion and transfer. For the reasons set forth below, respondent's action is affirmed.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;

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2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
3. Whether complainant has failed to mitigate his damages;
4. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

Per complainant's request, the witnesses were sequestered from the hearing room unless testifying, except for complainant and respondent's advisory witness, Mary West.

FINDINGS OF FACT

The ALJ considered the exhibits and testimony, assessed the credibility of the witnesses and made the following findings of fact which were established by a preponderance of the evidence.

1. John Tafoya, complainant, became a correctional officer I with the Department of Corrections (DOC) on January 11, 1988. In October 1997 he became a captain, his third promotion, at the Buena Vista Correctional Facility. On December 1, 1998, he was assigned to the Colorado Correctional Center (CCC), also known as Camp George West, in Golden. He has received no prior corrective or disciplinary actions.
2. As Captain, Tafoya was second-in-command to the CCC warden,

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Allan Bennett. CCC is a small facility compared to other correctional facilities, with approximately 150 inmates and 38 staff persons. CCC is a minimum security facility.

3. Suzanne Valdez, who had worked for DOC from 1991 to 1997, transferred back to DOC as a seargent at CCC in May 1999, following a stint with the Department of Public Safety.

4. Valdez was assigned to work the day shift in the visiting center five eight-hour days per week. For four years prior to complainant transferring to CCC, this shift was a four-day, ten-hour shift, the purpose of which was to provide sufficient time for the visiting center staff person to accomplish the necessary paperwork, since an eight-hour shift consisted mostly of handling visitors. Valdez had difficulty keeping up with the paperwork, as did the previous correctional officer who worked this shift. Valdez requested that the shift return to four ten-hour days. Complainant believed that the daily shift should remain at eight hours. He informed Valdez that no changes would be made, and if she could not get the work done he would find someone who could. Beginning during July, complainant spoke in a rude and angry tone of voice when addressing Valdez.

5. One of Valdez's duties was to pick up medications and inmate files at the Denver Regional Diagnostic Center and bring them to CCC. One day she left an inmate file in the van, contrary to DOC policy. Her supervisor, Phil DeFelice, discussed this with her and verbally reprimanded her. Complainant approached her in the visiting center when inmates, visitors, and staff were in

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the area and angrily said that he did not care if her supervisor had already talked to her, he thought she did sloppy work.

6. Complainant asked DeFelice for a performance documentation of Valdez regarding the van incident. DeFelice did not provide the requested written documentation because he had already given Valdez a verbal reprimand, and he considered the issue closed; it was not the first time an employee had left something in the van.

7. Because Valdez had said to DeFelice that she thought complainant was picking on her, DeFelice mentioned this to complainant in the hope that complainant would understand how Valdez felt and would not be so hard on her. He was hoping that the situation would improve, but it got worse when complainant directly confronted Valdez about her feelings. Later, DeFelice apologized to Valdez, saying that his only intent was to help improve matters but his comment to complainant "backfired."

8. Complainant told Valdez that DeFelice had said that she thought she was being picked on by him and that she should stop whining and just do her job. She felt intimidated.

9. On August 16, 1999, complainant called Valdez into his office regarding a week-long trip she had taken with her mother to Iowa to care for her sick grandparents. Her leave request had been approved, but not by him. Complainant told her that he would not have approved the leave, and that she should be careful around her co-workers because they did not like the fact

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that she had been gone so long. This comment made her nervous. Complainant was angry and spoke harshly. Valdez began to fear him after this meeting.

10. Valdez went to DeFelice, saying that she was uncomfortable in complainant's presence and asking if arrangements could be made for someone else to be present when she had to have contact with him, preferably DeFelice because he was her supervisor.

11. Warden Bennett asked Valdez if she preferred to work four ten-hour days in the visiting center rather than five eights. She responded in the affirmative, and he said it would be done. Later, however, Bennett told her that the change would not be made at that time because complainant was opposed to it. Complainant approached Valdez and angrily accused her of going around him to get her schedule changed.

12. DeFelice completed the three-month performance review of Valdez covering the period May 1, 1999, to August 31, 1999. He rated her Fully Competent overall. Upon his review, complainant added to Factor D that questioning orders may be interpreted as insubordination and will not be tolerated. (Ex. 46.)

13. On September 10, 1999, complainant called Valdez into his office and angrily berated her as an employee. Valdez stated her opinion that he had a personal issue with her, and they should go to the warden's office and get it resolved. Complainant declined to do so. Valdez then asked that another person, anyone, be brought in to observe the meeting.

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Complainant rolled his chair so his face was twelve to eighteen inches from Valdez and said that he did not need anyone else. He was angry and spoke in a raised voice, as did Valdez at some point. He called her a "piece of shit," and Valdez eventually started to cry. Complainant had closed the door, and his chair was situated between Valdez and the door such that Valdez did not feel free to leave. When she was crying too hard to talk, complainant handed her a roll of toilet paper and said to wipe her tears and take a couple of deep breaths. The meeting went on for approximately forty-five minutes and finished up after the end of Valdez's shift. She left with a tear-stained face.

14. That evening, unable to reach him at his office, Valdez called Warden Bennett at his home to tell him what happened.

15. On September 15, 1999, Valdez drafted a grievance against complainant alleging that Captain Tafoya had been abrasive and intimidating with her on numerous occasions. She used the September 10 meeting as an example of Tafoya making threatening statements about her career and being "extremely" intimidating, causing her to feel physically threatened. She requested that she be able to work in a nonhostile environment free from retaliation, threats or intimidation from Tafoya, and that an impartial third party be present at all meetings she had with Tafoya. (Ex. 4.)

16. Valdez filed her grievance with Bennett on September 20. Bennett called an informal meeting with complainant and Valdez in his office that afternoon.

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17. At this grievance meeting, Bennett handed a copy of the grievance to complainant and asked him if he wanted to read it.

Complainant threw the document on the table and said that he did not want to read it because it was a "pack of lies." Complainant started to leave the room, but Bennett told him to stay and get the matter resolved. He stayed but remained angry and uncooperative during the meeting.

18. Bennett determined that Valdez's request was reasonable, and he granted it, as follows: "As the appointing authority for both you and Captain Tafoya, I am going to grant you the relief which you requested to have either me or another third party who would be impartial present at any job performance evaluations or job performance counseling meetings where your job performance is being discussed with Captain Tafoya." (Ex. 48.)¹ Bennett also instructed complainant to change the visiting center work schedule back to four ten-hour days like it had been before.

19. Subsequent to her September 20 grievance, Valdez submitted several requests for training which were disapproved by complainant. On November 30, 1999, complainant approved Valdez's request to attend a mandatory training session, but required that she attend the class on her day off and without pay. (Ex. 51.) It is against DOC policy to require employees to attend mandatory training on their day off without compensation.

¹ Bennett inadvertently wrote that the meeting was held on September 22. The correct date is September 20.

20. As a DOC employee, Valdez is required to attend 40 hours of training each fiscal year. On November 29, 1999, Valdez was notified that she had not accumulated any training hours during the current fiscal year, commencing July 1, 1999. (Ex. 49.)

21. Valdez requested leave for December 5, a day for which she had made plans, for use as her December holiday. Complainant denied this request and scheduled her to be off on December 20.

Since this was not the day she had asked for, she submitted a leave request canceling December 20 and asking that she combine the December holiday leave with her January holiday leave. Complainant denied this request, commenting that there was no need to run two holidays in January. (Exs. 56, 57, 58.)

22. Valdez filed a grievance on November 12, 1999, alleging that complainant's harassing and intimidating behavior was continuing, and seeking an end to hostilities in the workplace. (Ex. 62.)

23 On September 17, 1999, Officer Rudy Dorsey had a run-in with inmate J, one of the inmates he supervised. The inmate became loud and disruptive, not wanting to accept a work assignment. Inmate J started to walk away and Dorsey ordered him to stop, but the inmate kept walking. Dorsey ordered inmate J to go to the control center, and later, at the control center, told him he was going to get a "write-up."

24. Ordering a loud and disruptive inmate to go to the control center is consistent with CCC policy, with the control center

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being notified by radio that the inmate is on his way there.

25. Harold Craft, Dorsey's direct supervisor, and his secondary supervisor, Michael Siemsen, both believe that Dorsey followed proper procedures; they have no criticism of the way he handled the situation concerning inmate J.

26. On September 21, 1999 around 3:30 p.m., at the end of his shift when he was walking out the gate to go home, and without prior notice, Dorsey was approached by complainant to meet in complainant's office with inmate J, whom complainant had known at the Buena Vista facility. At the meeting, Dorsey was required to explain why he gave inmate J a write-up, yet he was not provided the opportunity to explain anything. Complainant insisted that Dorsey answer only "yes" or "no" to his questions, as well as to the inmate's cross-examination-style questions. The inmate denied all wrongdoing. Dorsey did not get a chance to give his version of events. But he would not agree to drop the charges, which was complainant's apparent wish. Complainant told Dorsey that he, complainant, was looking out for Dorsey's career, which seemed threatening to Dorsey because it made him think that his job performance was being questioned. Complainant told Dorsey that the inmate might file a grievance against him. The meeting lasted approximately 40 minutes.

27. The next day, September 22, Dorsey filed a grievance against complainant, asking that he not be questioned in front of inmates, not to be asked why he wrote up an inmate in the presence of the inmate, that hearing officers resolve charges

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against inmates, and that he not be used as a negative example during a training session, a request stemming from a training session conducted by complainant in which complainant held Dorsey out as a example of doing things wrong. (Ex. 1.)

28. At the Step 1 grievance meeting, held on September 22 with Dorsey, complainant, and Dorsey's supervisor, Lt. Craft, complainant talked in a louder-than-usual voice and asked Dorsey questions while insisting upon yes or no answers. Dorsey was intimidated by having to answer either yes or no, as well as when complainant made the statement that he was just looking out for Dorsey's career and that his career with DOC could be hurt "if this goes any further." Dorsey was again not allowed by complainant to explain anything. Complainant used arm and hand motions in an intimidating manner while speaking.

29. Craft issued his Step 1 decision as follows: "Dorsey was not given the opportunity to talk about this matter as Capt. Tafoya dominated the meeting. This was through domination, intimidation, veiled threats and hostility. He said 'that he was only looking out for Officer Dorsey's job performance.' Buddy/Buddy. Plus Capt. Tafoya demanded an immediate answer, yes or no. It was settled to Capt. Tafoya's satisfaction not to Officer Dorsey's." (Ex. 3.) Craft was left with the impression that if the meeting did not go complainant's way he would take retaliatory action against Dorsey.

30. Even though he was dissatisfied with the Step 1 decision, Dorsey did not pursue the matter further due to his fear of

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retaliation from complainant.

31. Three days or so after the three-way meeting involving inmate J, Tafoya told Sgt. Siemsen to have a talk with Dorsey about how he handled the inmate situation. Though Siemsen was uncomfortable with this idea in the absence of Dorsey's direct supervisor, Craft, feeling that complainant was giving him this directive specifically because Craft was not there, he went ahead and talked to Dorsey and reported back to complainant that he had done so. Complainant stated to Siemsen that Dorsey did not communicate with inmates very well and was not qualified to do his job.

32. Inmate J was found guilty of the charge of facility disruption at a hearing held pursuant to the Code of Penal Discipline.

33. With respect to the grievance procedure, Administrative Regulation (AR) 850-04 IV(C) provides that an offender with a complaint will first attempt to resolve the matter informally and shall attempt to discuss the matter with one or more of the following people: a) the staff member responsible in the area of the problem; b) the case manager; c) the appropriate supervisory staff; d) other institutional staff. (Ex. R.)

34. A three-way meeting such as that called by complainant involving Dorsey and inmate J is not an option provided by DOC regulations. Although it is a practice not specifically prohibited, it is not generally accepted in the DOC system. An

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inmate should not be invited to observe a disagreement between an officer and a supervisor. The officer should be asked if he wants to mediate with the inmate, and he should always be given advance notice of the scheduled mediation. Neither Craft, a 26-year DOC employee, nor Bennett, a 33-year DOC employee, approve of the manner in which complainant handled this inmate complaint. He did not tell Bennett about it; Bennett found out by hearing it from someone else.

35. In October 1999, Bennett asked Mary West, who had supervisory responsibility over CCC and six other correctional facilities, to come to CCC for a meeting with complainant. West did so.

36. At the meeting, Bennett talked about complainant's management style and stated that some staff members were afraid of him. He specifically mentioned the issues surrounding Valdez and Dorsey. Complainant denied there was a problem and would not accept any responsibility for the circumstances that led Bennett to request the meeting. He said it was Bennett's problem; he had done nothing wrong. West told complainant that she was bothered by the fact that he would not accept any responsibility whatsoever and that if he would, then they could work together to resolve the issues.

37. The problems causing Bennett's concerns continued after the meeting with West. Around this time, complainant became very sullen and spent most of his time in his office.

38. On November 12, 1999, Dorsey filed a grievance with Bennett

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and Dr. West to discuss a solution to complainant's ongoing harassment and intimidation and try to relieve the hostilities in the workplace. (Ex. 2.)

39. On November 17, 1999, Bennett asked the DOC Inspector General for an investigation of allegations of ongoing workplace harassment and creation of a hostile work environment on the part of Captain Tafoya. In his written request, Bennett named three staff members who had filed harassment and hostile work environment grievances against complainant. The staff members named were: Sgt. Valdez, CO Dorsey, and CO Stacie Pierce. He noted that he had instructed Tafoya to have limited contact with these three individuals during the course of the investigation. (Ex. 5.)

40. On November 19, 1999, complainant filed a grievance against Bennett. Because of that filing, Bennett withdrew himself from the process of resolving all matters with respect to complainant. Mary West then assumed the appointing authority responsibilities.

41. West requested and received a letter from Bennett detailing the ongoing situation. Bennett wrote in this December 20 letter that complainant had a very dictatorial style of management and had a difficult time with anyone who dared disagree with him. He related to West that he had had several talks with complainant about why he got so angry with staff, without ever receiving an answer to that question. Overall, Bennett stated, complainant "went back to his old ways" after their meeting in

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October, and that little or nothing had been accomplished by that meeting. (Ex. 6.)

42. On December 27, 1999, West administratively suspended Tafoya based on allegations of workplace harassment involving CCC personnel, and pending the completion of the Inspector General's investigation. (Ex. 8.)

43. Bennett retired from DOC on January 30, 2000.

44. The written report of the investigation was completed on February 28, 2000. West spent a considerable amount of time reading and reviewing this report, which was approximately 400 pages in length. (Ex. 15.)

45. By letter dated April 10, 2000, West notified complainant of a pre-disciplinary meeting to discuss his possible violations of the DOC Administrative Regulations. (Ex. 9.)

46. The R-6-10 meeting was held on April 21, 2000, complainant appearing with his attorney. West read the findings of the investigative report as related to complainant, specifically with reference to the grievances of Valdez, Dorsey, and Pierce.

(Ex. 10.) Complainant asked for and received more time to respond to the charges. A second meeting was scheduled.

47. The second R-6-10 meeting was held on May 2, 2000, with the same parties present, and West making reference to having given complainant "all of the information on the investigation" at the

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April 21 meeting. (Ex. 11.)

48. In making her decision of whether to impose discipline, West took into consideration all of the events surrounding the grievances of Valdez and Dorsey. Initially, she considered the Pierce grievance as well, but then disregarded the Pierce situation because Officer Pierce had resigned her position and her grievance became moot. She also took into account allegations of harassment made by John Alborghetti and Sheryl Wood.

49. The primary issue for West was complainant's treatment of people, particularly Valdez and Dorsey, but others as well. She was influenced by complainant's total denial of all responsibility and wrongdoing, as well as his actions toward the warden in expressing anger and refusing to rationally discuss the Valdez grievance. She concluded that complainant was untruthful in some respects because his account of events was inconsistent with those of the other witnesses and with documentation of the length of meetings, with, for example, complainant stating that the Dorsey-inmate meeting only lasted for ten minutes when the facility log corroborated Dorsey's statement that the meeting lasted for 45 minutes. She also felt that complainant's conduct at the meeting was poor management practice and jeopardized the security of the facility by undermining the authority of a correctional officer.

50. West concluded that complainant's actions were flagrant, willful, and violative of DOC regulations. She concluded that

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his behavior warranted discipline, and that a corrective action to correct or improve his performance or behavior would serve no purpose because he took no responsibility for his misconduct and denied all wrongdoing. She also decided to transfer him to the Denver Women's Correctional Facility because he had created a division among CCC staff, and there was a vacancy there that complainant could fill and which would not require him to move his residence from Denver.

51. By letter dated June 8, 2000, the appointing authority imposed a six-month demotion upon complainant, from Correctional Officer IV to Correctional Officer III, and transferred him to the Denver Women's Correctional Facility, finding that his actions violated DOC Administrative Regulations 1450-1, Staff Code of Conduct, regarding professional relationships with colleagues, bearing false witness against other staff, willfully departing from the truth, and workplace harassment in any form, and 1450-29, which prohibits intimidating, threatening, or hostile behavior. (Ex. 12.)²

52. Complainant John Tafoya filed a timely appeal on June 21, 2000.

DISCUSSION

² AR 1450-1(IV)(T), as cited in the letter, should be (IV S); AR 1450-29, as cited in the letter, should be 1450-129. (See Ex. W.)

Legal Standard

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. *McPeck v. Colorado Department of Social Services*, 919 P.2d 942 (Colo. App. 1996).

An administrative agency abuses its discretion when the decision under review is not reasonably supported by any competent evidence in the record. *Van Sickle v. Boyes*, 797 P.2d 1267 (Colo. 1990). No competent evidence means that the agency's ultimate decision is so devoid of evidentiary support that the only explanation must be that the agency's action was an arbitrary and capricious exercise of authority. *Board of County Commissioners v. O'Dell*, 920 P.2d 48 (Colo. 1996).

The credibility of the witnesses and the weight to be given their testimony are within the province of the

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administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). The fact finder is entitled to accept parts of a witness's testimony and reject other parts. *United States v. Cueto*, 628 F.2d 1273, 1275 (10th Cir. 1980). The fact finder can believe all, part, or none of a witness's testimony, even if uncontroverted. *In re Marriage of Bowles*, 916 P.2d 615, 617 (Colo. App. 1995).

In making credibility determinations, the administrative law judge is guided by the factors set out in CJI 3:16, which include: the witnesses' means of knowledge, strength of memory and opportunities for observation, the reasonableness or unreasonableness of their testimony, their motives, whether their testimony has been contradicted, any bias, prejudice or interest, and their manner or demeanor on the witness stand.

Arguments

Respondent essentially argues that the proven facts support the appointing authority's reasoning and the conclusions she drew, as expressed in her letter demoting complainant, whose pattern of intimidation and degradation of employees created a hostile work environment and was especially offensive in view of complainant's position as Captain and second-in-command, rendering his conduct flagrant and serious. The appointing authority would have been remiss in condoning complainant's behavior, according to respondent.

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Complainant adopts the opposite view, arguing that the facts do not support the need for discipline, and that the agency was out to get him. Complainant also contends that he was denied due process at the pre-disciplinary meeting when he was not provided witness statements and was not told all of the reasons for which discipline might be imposed, specifically the incidents involving Wood, Alborghetti, and others besides Valdez and Dorsey. Complainant puts forth that he was just doing his job, and the grievances filed by Valdez and Dorsey in November were not even acted on.

Analysis

Substantial evidence supports the appointing authority's decision. Respondent satisfied its burden under *Kinchen, supra*, *McPeck, supra*, and *Van Sickle, supra*. Respondent was not out to "get" Tafoya.

Complainant was not denied due process at the R-6-10 meeting by not being provided witness statements. Pre-disciplinary meetings are informal and are not of record; an appointing authority is not required to present any evidence against the employee. *Kinchen v. Department of Institutions*, 867 P.2d 8 (Colo. App. 1993), *aff'd*, *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). This due process deficiency is sustainable because complainant had the opportunity for a post-

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disciplinary evidentiary hearing before a neutral third party. *Kinchen v. Department of Institutions, supra*, 867 P.2d at 11. Additionally, the investigator testified that she advised complainant that, pursuant to DOC policy, he would be provided witness statements upon written request at the conclusion of the investigation, but no such request was made.

Complainant's argument that he should have been given all of the reasons for potential discipline, not just the events revolving around the Valdez and Dorsey grievances, is more persuasive. An employee must be provided with notice of the purpose of the pre-disciplinary meeting and the matters to be discussed. *Bourie v. Dep't of Higher Education*, 929 P.2d 18, 22 (Colo. App. 1996). In the present matter, the investigation was requested on November 17, 1999, for the purpose of looking into allegations of workplace harassment and creation of a hostile work environment made by Valdez, Dorsey, and Pierce. (Ex. 5.) Complainant certainly had notice of those grievances. At the R-6-10 meeting of April 21, 2000, the appointing authority read the charges against Tafoya involving the Valdez, Dorsey, and Pierce grievances. Complainant's request for additional time to respond was granted, and a second meeting was scheduled for May 2, when complainant was afforded a full opportunity to respond to the Valdez, Dorsey, and Pierce complaints. When making her decision, the appointing authority first considered, then disregarded the Pierce grievance because Pierce had resigned. No evidence pertaining to the specifics of the Pierce grievance was introduced at hearing. However, the appointing authority

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considered evidence of incidents involving other employees, most notably Alborghetti and Wood. For purposes of this Initial Decision, those employees are not taken into consideration, and no findings of fact are made with respect to them.

Based on the found facts, complainant's demotion and transfer were warranted. The conclusions of the June 8 disciplinary letter (Ex. 12) were sufficiently supported by credible evidence. The credible evidence demonstrates that the appointing authority pursued her decision thoughtfully and with due regard for the circumstances of the situation, as well as complainant's individual circumstances. The appointing authority did not abuse her discretion. See Rules R-1-6, R-6-2, R-6-6, R-6-9 and R-6-10, 4 C.C.R. 801.

It was not unreasonable for the appointing authority to conclude that a corrective action, which is "intended to correct and improve performance or behavior" would have no effect on complainant because he denied having any part of the personnel problems that the facility was experiencing. See R-6-8, 4 C.C.R. 801. She had seen no indication from him that he would make a sincere effort to correct or improve his performance or behavior, which he thought impeccable. She expressed this concern at the meeting with him that she attended, and thereafter. Yet, the situation was serious enough to require her to take some kind of action for the benefit of the facility. See R-6-2, 4 C.C.R. 801.

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With respect to the propriety of the transfer, Director's Procedure P-4-5 provides that, if the transfer is within the same agency, it is at the discretion of the appointing authority; if the employee refuses the transfer, the employee is deemed to have resigned. Here, the appointing authority exercised sound judgment in determining the best interests of the Department of Corrections.

As to complainant's assertion that the November grievances were not acted on, the grievances were filed on November 12, related to the allegations and concerns of the ones filed in September, and appropriately were incorporated into the investigation, requested on November 17.

This is not a proper case for the award of attorney fees and costs under section 24-50-125.5, C.R.S., of the State Personnel System Act. See also R-8-38, 4 C.C.R. 801.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious or contrary to rule or law.
2. The discipline imposed was within the range of alternatives available to the appointing authority.

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3. No evidence was introduced on the issue of mitigation of damages.

4. Neither party is entitled to an award of attorney fees and costs.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of
January, 2001, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge
1120 Lincoln Street, #1420
Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

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2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

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The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of January, 2001, I

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placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Charles F. Kaiser
Attorney at Law
1801 Broadway, Suite 1100
Denver, CO 80202

and in the interagency mail, addressed as follows:

Susan J. Trout
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

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